**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (Ford Motor Co.)** ***and*** **Jerry V. Kirby.** Case 7–CB–10706

March 31, 1998

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On August 5, 1997, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.

As the judge found, the Respondent violated Section 8(b)(1)(A) of the Act by refusing to allow the Charging Party, because he was not a union member, to utilize the Respondent's internal appeals process to appeal a union decision not to pursue his discharge grievance to the final step of the contractually established grievance procedure, which allows for submission of the grievance to an impartial umpire.[3] To remedy that violation, the judge ordered the Respondent to cease and desist from refusing to allow the Charging Party and other employees who are not union members to appeal, pursuant to the internal appeals process set forth in its constitution, a decision not to submit a discharge grievance to an umpire. Among other things, he also ordered the Respondent to revise or interpret its constitution to allow nonmembers the same rights of appeal as members in grievance matters. We agree with the Respondent that those provisions are too broad.[4] There is no indication in the record that the Respondent's appeals procedure can be used to reinstate a grievance of employees other than employees employed by Ford Motor Company.[5] Therefore, we shall modify those provisions of the Order to apply only to Ford employees.

The judge further ordered the Respondent to post the required notice at its union office and other places where it customarily posts notices to members in Michigan. We find that provision inappropriate as well. The Board normally orders the posting of notices only where there are employees who are affected by the unfair labor practices at issue. The judge's provision is too broad in that it would require posting of notices in places where the Respondent represents employees of employers other than Ford. On the other hand, the collective-bargaining agreement indicates that it applies in other States as well as Michigan. The judge's provision thus is too narrow in that it would not require notices to be posted where the Respondent represents Ford employees in States other than Michigan. We therefore shall revise the judge's recommended Order to require the Respondent to post notices at its union office and at other places where it customarily posts notices to Ford employees.

## ORDER

The National Labor Relations Board orders that the Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of

[1] The Respondent has excepted to the judge's exclusion of evidence that Charging Party Kirby's discharge grievance was nonmeritorious. We find no merit in that exception. The Respondent informed Kirby that it would not process his appeal of the Respondent's refusal to seek review of the denial of his grievance because he was not a union member, not because the grievance lacked merit. As the judge found, the Respondent was not required to have a process for unit employees to appeal such a refusal, but because any such process directly affects employees' employment relationship with the employer, any appeal process that the Respondent does provide must be available to all affected employees, regardless of union membership. By refusing to allow Kirby to appeal because he was not a union member, the Respondent restrained and coerced him in the exercise of his Sec. 7 rights, in violation of Sec. 8(b)(1)(A).

[2] The Respondent contends that if it is found to have violated the Act as alleged, and if it is required to process nonmembers' appeals, it should be allowed to charge them for the costs of processing. As there is no allegation that the Respondent has attempted to charge nonmembers in this fashion, that issue is not properly before us.

[3] The judge characterized as ''internal'' the Respondent's rule allowing only union members to use its appeals procedure. However, the Respondent's decision not to appeal the denial of Kirby's discharge grievance to the final stage of the contractual grievance procedure had an effect on his employment relationship with Ford Motor Company. Thus, the Respondent's refusal to permit Kirby to use the appeals process to obtain a review of that decision was not simply an internal union matter. And because that refusal was discriminatory, i.e., based on nonmembership, it was unlawful.

[4] Chairman Gould would require the Respondent to revise its constitution to allow nonmembers the same appeal rights as members in grievance matters. In his view, the inclusion of the term ''member'' may mislead employees into thinking they must become union members in order to gain the right to appeal an adverse decision by the Union regarding grievance processing. Cf. his concurring opinions in *Group Health, Inc*., 325 NLRB No. 49, slip op. at 5–7 (Feb. 2, 1998), and *Monson Trucking*, 324 NLRB No. 149, slip op. at 6–8 (Oct. 31, 1997), and his dissenting opinion in *Teamsters Local 443 (Connecticut Limousine Services)*, 324 NLRB No. 105, slip op. at 6–7 (Oct. 2, 1997).

Inasmuch as neither the General Counsel nor the Charging Party has sought any modification of the Order, and the issue raised by the Chairman has thus not been addressed, Members Fox and Hurtgen decline to make the change to the Order that he suggests.

[5] As the judge noted, a side agreement between Ford and the Respondent provides that a grievance may be reinstated if its disposition has been found improper through the Respondent's internal appeals process. There is no evidence of any such agreement between the Respondent and any other employer.

America (UAW), AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to allow Jerry V. Kirby or any other nonmember employee of Ford Motor Company the same rights as members to appeal, pursuant to its constitution, a decision not to submit a discharge grievance to an umpire.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revise or interpret article 33 of its constitution so as to permit nonmember employees of Ford Motor Company the same rights of appeal, if any, as members with regard to contractual grievance matters and allow Jerry V. Kirby to appeal the decision not to submit his discharge grievance to an umpire.

(b) Within 14 days after service by the Region, post at its union office and other places where it customarily posts notices to employees and members employed by Ford Motor Company, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to allow Jerry V. Kirby or any other nonmember employee of Ford Motor Company the same rights as members to appeal, pursuant to our constitution, a decision not to submit a discharge grievance to an umpire.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revise or interpret article 33 of our constitution so as to permit nonmember employees of Ford Motor Company the same rights of appeal, if any, as members with regard to contractual grievance matters, and allow Jerry V. Kirby to appeal the decision not to submit his discharge grievance to an umpire.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL–CIO

*Amy Roemer, Esq.*, for the General Counsel.
*Leonard R. Page, Esq.*, of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Detroit, Michigan, on December 18, 1996, on a complaint dated February 29, 1996. The charge was filed by Jerry V. Kirby, an individual, on October 12, 1995. The issue is whether the Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by denying Kirby, who is not a member of the Union, its internal appeal procedure.

The Respondent filed a timely answer, admitting the jurisdictional allegations, and the factual allegations that the Union refused to allow Kirby the use of the internal appeal process because he was not a member.

The record in this case consists of the transcript of the brief hearing and exhibits, including a statement of stipulated facts received as a joint exhibit . On the entire record in this case, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Ford Motor Company (the Employer) is a corporation with an office and place of business in Dearborn, Michigan, and is engaged in the manufacture, sale, and distribution of automobiles and related automotive products deriving gross revenues in excess of $500,000. With purchase and receipts in excess of $50,000 directly from points outside the State of Michigan, the Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent has admitted that it is a labor organization within the meaning of Section 2(5) of the Act.

## II. BACKGROUND

On or about March 31, 1994, the Respondent Union (Local 36) filed a grievance in accordance with the procedure contained in the collective-bargaining agreement with the Ford Motor Company of behalf of Jerry V. Kirby, the Charging Party. The grievance process consists of four stages, the last of which is entitled ''Appeal to Umpire,'' and is available if a satisfactory disposition has not been made after three stages (G.C. Exh. 3).

According to the stipulated facts, Kirby was informed by memorandum of January 30, 1995, that his grievance had been denied at the third stage and that it was being sent to the UAW International to be appealed to the umpire (Jt. Exh. 1, attachment A). However, on May 16, 1995, the Union orally informed Kirby that his grievance would not be submitted to the umpire.

On June 1, 1995, Kirby filed an appeal of the Union's decision in accordance with the internal appeals procedure of the Union. In its letter of June 26, 1995, the Respondent acknowledged Kirby's written appeal and informed him that he would be notified of the outcome (Jt. Exh. 1, attachment D). In a subsequent letter, dated July 28, 1995, the Union informed Kirby, inter alia, as follows:

> Our International constitution, Article 33, Section 1, provides that a member shall have the right to appeal pursuant to this Article. The record will show that you were discharged March 31, 1994 . . . the discharged member must within *the last* 10 days of the sixth full month certify in writing . . . to continue to remain a member. It is my understanding that you did not avail yourself of this provision . . . and therefore you do not have the status of a member to make an appeal.

In substance, Kirby had failed to comply with the provisions contained in article 16 of the Respondent's constitution providing for a member's retention of his union status and, the Union denied Kirby the right to appeal, pursuant to article 33 of the constitution, because he was no longer a member of the Union (G.C. Exh. 2). Until then, Kirby was unaware that his union membership had lapsed pursuant to article 16, which required his written notice of his intention to remain a member.

The General Counsel does not quarrel with this aspect of the Union's internal rules, but he does take issue with article 33 of the Respondent's constitution which limits the internal appeals procedure to members. Article 33 which provides, inter alia, that a ''member thereof shall have the right under this Article to appeal any action . . . or refusal to act . . .'' contains detailed provisions dealing with levels of appeal, procedures at each level, other general requirements, and what may be appealed. A refusal to act by a union official or a local, as for example the decision not to submit the grievance to an umpire may be appealed under that article. Moreover, the UAW and Ford have ''agreed that a successful Article 33 appeal will reinstate a withdrawn or settled grievance,'' and, if successful, the Respondent would then resume ''processing the grievance in the contractual grievance procedure pursuant to the Reinstatement of Grievance letter'' of the collective-bargaining agreement (Jt. Exh. p. 5).

The General Counsel argues that the Union unlawfully denied Kirby the right to appeal and by limiting the appeal rights to union members, the Respondent violated Section 8(b)(1)(A) of the Act, by restraining or coercing employees in their Section 7 rights. However, the General Counsel did not regard the Respondent's action as a failure to properly represent the Charging Party in violation of its duty of fair representation regarding the processing of the discharge grievance (Jt. Exh. 1, attachment G).

The Respondent argues that it properly denied Kirby the appeal because a union has a right to prescribe its own rules with regard to the acquisition or retention of membership and, because nonmembers, like Kirby, have no right to participate in union governance decisions, including decision as to who may or may not appeal union decisions.

### Discussion

Both sides, citing case law, agree that the Union has a right to promulgate its own internal rules for the acquisition and retention of membership. But the parties disagree whether the internal rules governing appeals from the adverse actions of union officers or local members can be enforced so as to exclude nonmembers. Citing *Scofield v. NLRB*, 394 U.S. 423 (1969), the General Counsel argues that a union may not enforce internal rules whose application violates the policies of the Act. There, the Court stated that a union is free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. However, the enforcement of a rule which impairs a statutory labor policy violates Section 8(b)(1)(A) of the Act.

The Respondent argues that unions ''may limit the right of non-union members in the governance of their exclusive bargaining representative.'' If, according to the Union, the internal union appeal concerned local union elections, ratification procedures, or the right to participate in union meetings, the issue would not have arisen. And on appeal from the withdrawal of the discharge grievance likewise concerns governance of the UAW, because the unions already have a duty of fair representation for nonmembers.

Nevertheless, the record clearly shows and the Respondent does not contest that union members have a chance to retain union representation through the use of the internal appeal process even after the grievance process has been exhausted. An individual's status as an employee is clearly affected by the Respondent's article 33 procedure, and a member's chance to remain employed is obviously enhanced. The privilege accorded a member, namely the right to appeal an adverse decision, has the coercive effect on unaffiliated employees to join the union. Section 7 of the Act provides that employees shall have the right to join a union and the *right to refrain* from any such activity. It follows that article 33 in the context of the grievance process contravenes the statutory labor policy inherent in Section 7 of the Act. *Scofield v. NLRB*, supra. This is particularly so because ''[t]he grievance procedure is at the heart of labor policy.'' *Electrical Workers UE Local 745*, 759 F.2d 533, 535 (6th Cir. 1985).

The Board has held unlawful union policy of internal rules which have a direct consequence of encouraging nonmembers to join the union. *Branch 6000 National Assn. of Letter Carriers*, 232 NLRB 263 (1977), enfd. 595 F.2d 808 (D.C. Cir. 1979). The General Counsel correctly states that the

Union is not required to provide the internal appeal as an added benefit to grievants, but the Act requires that if such an opportunity is provided it must be offered equally to everyone whom the Respondent represents. *Oil Workers Local 5-114 (Colgate-Palmolive Co.)*, 295 NLRB 742 (1989). I accordingly find that the Union violated Section 8(b)(1)(A) of the Act when it refused to grant Kirby the right to appeal the withdrawal of his grievance.

## CONCLUSIONS OF LAW

1. The Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

2. By denying the Charging Party, Jerry V. Kirby, the right to appeal pursuant to the Respondent's constitution because he was not a member of the Respondent Union, the Respondent has been restraining and coercing employees in the exercise of this Section 7 right in violation of Section 8(b)(1)(A).

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, l shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to allow Jerry V. Kirby to appeal the decision not to submit his discharge grievance to an umpire, the Respondent must be ordered to interpret or revise article 33 of its constitution so as to permit appeals by nonmembers of any actions regarding the processing of grievances, and to post appropriate notices.

[Recommended Order omitted from publication.]